SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-79

STATE OF NEW YORK,

Petitioner,

against

JOSEPH MINICONE and JOHN MASSIELLO, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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STATE OF NEW YORK,

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JOSEPH MINICONE and JOHN MASSIELLO, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the captioned case *sub nom. The People of the State of New York* v. *Joseph Minicone and John Massiello, Jr.*, on the 15th day of April, 1971, which reversed the respondents' convictions.

Citation to Opinions Below

The opinion of the New York Court of Appeals is printed at 28 N. Y. 2d 279. See Appendix "A."

The matter is reported from the New York Supreme Court, Appellate Division, Second Judicial Department, without opinion at 35 A. D. 2d 780 (1971).

The Trial Court rendered no written opinion.

Jurisdiction

The reversal of respondents' conviction by the New York Court of Appeals is a determination by the highest State court in which a decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3), the petitioner claiming rights, privileges and immunities under the Sixth Amendment to the Constitution of the United States.

Question Presented

In the opinion of the petitioner the following question is presented:

Whether in the circumstances of this case the delay in the trial of this indictment violated the respondents' right to a speedy trial as prescribed by the Sixth Amendment to the United States Constitution.

Constitutional and Statutory Provisions

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statement of the Case

On August 25, 1965, four men, all of them stock brokers, attended the American Stock Exchange Golf Tournament at the Century Golf Club in Purchase, New York (32, 74-75).* They were Hugo Florio, Robert Sagarese, William Friedman, and Alexander Benisatto (34). They arrived at varying times during the day (33, 75, 108), but all had dinner, although not necessarily together (110-111), which they finished at about 8:45 to 9:15 P.M. (34, 76, 111). Shortly thereafter they left the Club, accompanied by Marvin Friedman who drove his father's car (35). They drove to Midland Avenue in Yonkers where Marvin Friedman lived, and he got out of the car and turned the driving chores over to Benisatto (35-36, 76-77, 112-113).

From young Friedman's home the four men went to the Midland Rendezvous at 1133 Midland Avenue in Yonkers for a nightcap, arriving at about 10:00 to 10:15 P.M. (37, 77). They parked the car in front of the restaurant and entered. On your immediate left as you walk in is a door to the kitchen. Passing that you approach another door which gives access to the bar proper. On your right is a line of booths that goes from just beside the front door to the rear wall, and on the left, filling the entire side wall is the bar. At the far end of the room are the men's and ladies' rooms and a juke box (40-41, 77-79, 137-141, 204-205).

The four men approached roughly the center of the bar where there were two vacant stools. Florio seated himself on the farther stool from the door, and Benisatto sat on the nearer one, and the two faced one another and Friedman, who stood beside Benisatto and Sagarese who stood between Friedman and Florio (46-48, 80-81). That

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* Numbers in parentheses refer to pages of the printed trial record.

is not quite the arrangement Benisatto recalled, because he felt that Friedman was sitting on that left hand stool while he, Benisatto, stood. It is largely inconsequential, though, because everyone remembers that Florio was on the right hand stool, that nearer the back of the bar (115-116). The men ordered one drink, which was served (48, 82, 117). Friedman and Sagarese left at that point and went to the men's room where they encountered a man who Sagarese described as wearing a blue T-shirt. No conversation of any kind took place among them, however (84-85). The men returned to the bar and rejoined their friends, and while they were sipping their drinks they heard the sound of tinkling glass from the far end of the bar, that most distant from the door. It is not altogether certain whether this was the sound of something rapping against glass or the breaking of glass (48-49, 85-86, 117, 143), but whatever it was it was sufficient to cause Mr. Joseph Bottiglieri, the owner, who had been sitting in the booth nearest the door to walk over and say something to the group at the far end of the bar (49-51, 88). When the noise of the glassware continued, Florio half turned in his chair and said, "Why don't you fellows stop?" (119) or "Why don't you fellows be quiet?" or words to that effect, and turned his attention again to his own party.

With that, the man in the blue T-shirt who Friedman and Sagarese had met earlier in the men's room detached himself from a little cluster of men at the far end of the bar and walked up behind the four brokers and said—depending on who is telling the story—"What are you going to make of it?" (Sagarese, 90); " 'What are you, a wise guy' or 'Are you calling me a bum?' " (Benisatto, 121); "Who are you calling a bum?" (Cataldo, a witness, 148); or " 'What are you calling me?' or 'Are you calling me a bum?' " (Catano, another witness, 213). Florio, to whom the question was apparently addressed, didn't hear it; the next thing he knew was that he was draped on a

bar stool recovering consciousness, and Friedman, the only remaining occupant of the place, was lying between the bar and the booths gasping for breath (52-55).

Others, however, did see the blow landed. The man who threw it was identified as Saverio (Sam) Minicone, the respondent's brother and the man in the blue T-shirt (210, 332). He hit Florio with his fist and knocked him off the bar stool (90, 121, 148-149, 214). Sagarese, Friedman and Benisatto hauled him up and sat him back on the bar stool, but as Benisatto was turning he was hit too, and a group of men jumped on him and began to beat him (123). Friedman said to Sam Minicone, "Why did you do that?" and Minicone hit him as well (93-94, 149, 214). Sagarese ran for help and with the assistance of a passing motorist was able to telephone the police (94-95, 98).

Benisatto, however, wasn't so lucky; he managed to break away from his assailants and run outside, but they followed him and pounced on him and eventually reduced him to unconsciousness (124-126). Two young men had been in a party of three couples which was sitting in a booth quite near the brokers. When the fighting broke out they left and ushered their dates outside. The waiter, however, entirely unruffled by the commotion, sternly asked who was going to pay the check and suggested they step into the kitchen to adjust the matter. One of these young fellows, Richard Cataldo, remained behind with him while the other, Paul Catano, left with the others. Having seen the girls safely out of the area, Catano returned to Cataldo, and they paid the bill and left (150-151, 214-216). This sufficiently delayed their departure so that Benisatto had by then been pursued into the parking lot, and they saw him fall to the ground, and they also saw three men kicking him (152-154, 216-217).

The attendant at a Mobil service station next door to the restaurant, LeRoy Petersen, saw all this activity erupt out into the parking lot. He was sitting at a desk in the

office when he saw a group of people run out of the restaurant and shortly thereafter a lone man. From the angle of the man's course Petersen concluded he was making for a call box in the lot. He was immediately followed by three other men, one of whom tackled him, and then all three began to punch him and kick him. The victim kept trying to crawl away, but he was unable to do so. Finally the three men jumped into a black Chevrolet and roared away down Central Avenue (252-260).

Mrs. Benilda Henze also witnessed much of this. She and her husband were driving down Central Avenue and were going to turn right into Midland Avenue when they came upon *four* men beating up a single man. They were kicking him and punching him. She piled out of the car and began screaming at them to stop. When that was ineffective she ran into the restaurant, and when she came out again the men were gone. The victim was lying on the sidewalk (278-285).

These people may generally be divided into four groups. In the first group are those who cannot even confirm the happening of this assault on Benisatto in the lot. Into this group go Florio, who was knocked unconscious in the bar and didn't wake up until it was all over (57), and Friedman, who, whatever he might have witnessed, died of the injuries he received in the restaurant (341) and was not able to testify at all. The second group comprises witnesses who could attest that there was in fact such an assault on Benisatto but who could not identify the appellants as the guilty persons. Into this category go Benisatto himself (123, 126), Catano (217), and Mrs. Henze (281). The third grouping includes only Petersen, and his evidence may be briefly characterized as indicating that the respondents were two of three men who had, as a group, been punching and kicking Benisatto, although neither was identified as having delivered a specific punch or a particular kick (257-259). The fourth and final group

into which, again, only one witness fits is the ultimate identification of both respondents as active participants in the kicking of Benisatto, and that witness, of course, is Cataldo (152).

Following this attack on Benisatto he was taken by ambulance to Yonkers General Hospital, where he was examined by Gerald S. Mennin, M. D., an ophthalmologist and surgeon (262, 291-294). He found fractures of Benisatto's facial areas which he ascribed to the traditional blunt instrument in which category he included a shoe (296-297). He also consulted with James F. X. O'Rourke, M. D., whose findings coincided with his own (297, 320), and between them they concluded there was no alternative to the removal of the right eye (297-298), and on the following Monday morning the eye was taken out (298-299). He was released from the hospital five days later and continued to be treated by Dr. Mennin weekly for the next several weeks (300-301).

Two days after this free-for-all at the Midland Rendezvous, a young legal secretary named Laurette Olsson was at a bar in Mount Vernon called the Decca Restaurant. She was with a girl friend whose name she couldn't recall, and they sat at a table in the rear of the place (302-303). They had a pizza, and at some point or another the girl friend excused herself and went to the ladies' room, leaving Miss Olsson alone at the table. Her attention was attracted to one of the other tables, where the respondent Massiello was seated with two other men (304-305). He was boasting to them how they "had done a job on this guy and that his eye was pretty badly messed up" (306). She gave no indication that she had overheard him, and when her girl friend came back the two girls left (307). That was the People's case.

The defense called Saverio or, as he was called throughout the trial, Sam or Sammy Minicone. He stated that on August 25, 1965, he arrived at the Midland Rendezvous at

about 4:00 to 4:30 P. M. and that he remained there continuously thereafter. He was drinking scotch and water, and by about 9:00 P. M. he had drunk a minimum of eight or nine of them (330-332). He was with two other men whom he flatly refused to identify (344), but he denied that his brother, respondent Minicone, was there during any part of that day or evening (332). He was very bad at recalling times, and he placed the arrival of the respondent Massiello at anywhere between 7:30 (332) and 9:00 P. M. (348). When he did get there, he greeted Sam, ordered a pizza and had a drink, and along about that time, Sam allowed, he was feeling "pretty good" (333), although he insisted he wasn't intoxicated (364). A few minutes later a group of four or five men came in and stood about in the middle of the bar, a dozen feet or so from the north end of the bar where Sam's party stood (333-336).

The juke box was playing fairly loudly and Sam was keeping the beat with it by striking his glass with a cocktail stirrer in time to the music. One of the newcomers shouted down at him "I told you punks to keep quiet" (336-337, 351). Sam and his party did not respond and the speaker got off his chair and started down towards them. When he did so, Sam hit him and then walked over to this group of older men and hit a second one (337-338, 356-357). A third man chased him outside, and once outside Sam turned and began to fight with him. Massiello in the meantime had also come outside and was attempting to pull Sam off the other man (338). He was beating the stranger with his fists and when his loafer fell off he picked that up and began to strike at him with the shoe. It stopped as quickly as it started when Sam got up and ran, making good his getaway by going up and over a hill behind the restaurant (340). He didn't see Massiello again until he gave himself up (341).

The respondent Massiello testified in his own defense. He stated that on August 25, 1965, he and his wife of four

weeks had been working around the house, and they felt like a pizza. He drove to the Midland Rendezvous, arriving there a little after 9:00 P.M. and parked his car in front of the restaurant (397-398). When he walked in he went directly to the bartender and asked if his pies were ready (he had telephoned ahead and ordered them [425]), and the bartender told him to wait for a minute. While he was waiting Sam Minicone called to him from the far, or north, end of the bar. At the time, Sam was with one other man whom he introduced to Massiello as Bill Marino. Massiello didn't know the man and, at least at the time of the trial, never saw him again (401-402). Massiello, too, testified that his co-defendant, Joseph Minicone, was not at the Midland Rendezvous at any time while he was there (402).

Sam had heard of Massiello's marriage and he congratulated him on it, and they had a brief general conversation, during which Sam bought him a beer (403). While all this was going on, Sam was singing softly and tapping out the time on his glass with a stirrer. After about five to ten minutes, during which interval Massiello went to the men's room, another customer about midway down the bar made some sort of a remark to Sam to the general effect that he should make a little less noise, and Sam got up and walked down to the group where the comment had come from. There were a couple of words exchanged, but Massiello, who had remained where he was, wasn't paying much attention. It was only when someone got shoved that he moved, and he ran down and said, "Sammy, what are you doing?" Sammy disregarded him and punched a second man, so Massiello tried unsuccessfully to control him. He finally was able to persuade Sam to go over to the door and leave the place (404-407).

Once outside the restaurant the two men separated, Sammy going one way to a gas station and Massiello the other towards his car. However, a man Massiello believed

to be Benisatto came out behind them and began to shout, "Stay here a minute. I want to call the cops." The next time Massiello looked, Sam and Benisatto were fighting again, but he said that no one was ever tackled. Massiello raced over to the two grapplers and, joined by Bill Marino, attempted to separate them. They were unsuccessful, however, and finally when Benisatto was knocked to the ground they both stopped trying (408-412).

Massiello went home and the next morning went to work. On Friday, according to previously made plans, Massiello and his wife, who had never really had a honeymoon, drove to Atlantic City, New Jersey, to the home of an old friend of the family, Louis Vilotti. They arrived there about 3:00 P.M. and remained at Vilotti's as his house guests until the following Monday morning. He stated that they had had dinner on Friday evening at Vilotti's from between 7:30 and 10:00 P.M., thus placing him in Atlantic City at the time and on the date when Miss Olsson said she saw him in the Decca Restaurant in Mount Vernon nearly a hundred miles away (412-416). His presence there that evening was confirmed by Vilotti (528-531). He denied that he had committed the crime with which he was charged (417-419).

The defense also called Joseph Cumbo, the bartender at the Midland Rendezvous on August 25, 1965. He testified that he did not know Joseph Minicone and that in any event he was not at the restaurant that evening (476). According to his version of the story, Sam came in at about 9:00 P.M. and Massiello arrived at about 9:45 to 10:00 P.M. Sam was standing at the north end of the bar when Massiello entered the restaurant. The latter had ordered a couple of pizzas to go and asked Cumbo if they were ready. Apparently they weren't because Massiello walked down and struck up a conversation with Sammy. Cumbo was busy and took little notice of the two, but his attention was attracted by Sammy leaving his spot at the bar and walking up to Hugo Florio's party. He only

recalls that Sammy hit Florio and Florio went down. At that point he saw Massiello behind Sammy, and he heard Massiello say to him, "Sammy, let's get out of here." Cumbo thereupon very wisely retired to the kitchen and saw no more (475-481).

Eli Kazan, a florist, testified that he closed his shop on that evening at 9:30 P.M. When he had done so, he drove to the Midland Rendezvous, getting there at approximately 9:45 P.M. As he pulled into the parking lot he recognized Massiello among a group of three men outside the restaurant. Broadly described, it was a fight, but according to Kazan Massiello was not fighting; he was holding back one of the two men and was shouting, "Don't, don't" (494-498).

Two character witnesses were also introduced in behalf of Massiello. They were Nicholas Ragusa, a jeweler, and Arthur A. Natella, the principal of Lincoln High school in Yonkers. Each stated that they were aware of his reputation in the community as to peaceableness and nonviolence, and each stated that it was good (539-541, 544-546).

Peter Rosato, a member of the law firm by which the appellants were represented, testified that on the day before he testified he measured the distance between the front door of the restaurant and the point where Benisatto had been found. He determined that that distance was seventy-one feet (520).

The brother-in-law of Joseph Minicone, James Montellese, testified that in August of 1965 Minicone was living with his family in The Bronx. For about a week and a half, which included August 25th, he and Minicone were painting, wallpapering and laying linoleum from 6:00 P.M. to about 11:00 P.M. every evening (510-512). That testimony, if believed, would have made it impossible for Minicone to have been at the Midland Rendezvous when the attack on Benisatto took place.

Following the trial both respondents were convicted on July 16, 1969, in the County Court of Westchester County

of Assault, Second Degree, two counts, and Maiming. Each was sentenced to a term of imprisonment of from five to ten years. By its order of September 3, 1969, the Supreme Court, Westchester County, released Massiello in bail of $25,000.00, but Minicone by reason of ineligibility so to be treated was committed to Green Haven Prison at Stormville, New York, from which institution he was released in late April or early May, 1971. The Supreme Court, Appellate Division, Second Judicial Department, by its order dated October 19, 1970, affirmed those judgments of conviction, but the New York Court of Appeals, by its order dated April 15, 1971, reversed the judgments and dismissed the indictment.

The respondents' principal argument in the State courts, and the only one that survives for the consideration of this Court is that they did not receive the speedy trial mandated by the Sixth Amendment of the United States Constitution.

The respondents, together with Saverio Minicone, were indicted by the Grand Jury of Westchester County on September 28, 1965, and charged with the crimes of Assault, Second Degree, and Maiming. As the Court will have seen, Saverio's activities inside the bar are so inextricably bound up with those of all three defendants outside the bar as to make their simultaneous presentation to the Grand Jury well nigh mandatory. Consequently, the same Grand Jury after listening to this evidence also returned an indictment by which Saverio was charged in a separate indictment with the additional crime of Manslaughter, Second Degree, stemming from the attack on William Friedman. Each of them was arraigned on October 7, 1965, and each pleaded not guilty. All three respondents on each of the indictments were represented by Vincent W. Lanna, Esquire. The only point we would make here is that it was inevitable, because the criminal conduct of all three men was so interwoven and their defense so entwined, that the two indictments would be treated as but a single unit.

When, therefore, a motion to inspect the Grand Jury minutes was made on September 22, 1966, concededly on behalf of Saverio only, it was for administrative purposes deemed, if not to apply to, at least to halt any further proceedings on both indictments. When by his decision of February 13, 1967, Judge Dempsey denied that motion, it was rather belatedly indicated in the district attorney's files to have application only to Saverio. However, on April 20, 1967, Saverio pleaded guilty to Attempted Manslaughter, Second Degree, in full satisfaction of both indictments, and he was thereafter sentenced. On April 26, 1967, though, a new motion to inspect the Grand Jury minutes was received, this one on behalf of these two respondents, and by his decision of May 21, 1967, Judge Trainor denied that renewed motion. The case was restored to the trial calendar, but on June 28, 1967, it was adjourned until September 1967, owing to the fact that Westchester County at that time called no juries during the summer (County Court Minutes, Vol. 62, p. 496). We have no idea by what agency it went from September, 1967, but it next appeared on the County Court calendar on January 2, 1968, on which date it was adjourned to January 4, 1968 (C.C.M., V. 63, p. 374), and on that date it was again adjourned to February 6, 1968 (C.C.M., V. 63, p. 445). In the case of each of these adjournments the records bear no indication that there was any opposition to it.

On February 5, 1968, the trial began of *People* v. *Winkler* and *Ackermann,* who were charged with first degree murder in connection with the death of a professor of mathematics at Fordham University. They had been in jail continually since May 27, 1967. That ensuing conviction was affirmed as *People* v. *Winkler,* 34 A. D. 2d 834. Mr. Lanna represented Winkler in that case, and the verdict was returned on February 22, 1968. The following week the case of *People* v. *White* began on a first degree murder charge which arose out of the slashing of the throat of a young cocktail waitress on her way home from work

in North Tarrytown in the early hours of the morning. That defendant had been continually in jail in Connecticut and New York since December 17, 1965. The Court reversed that conviction, *People* v. *White*, 33 A. D. 2d 789. Mr. Lanna also represented White, and that case did not terminate until March 12, 1968. Surely no reasonable person could conclude that the district attorney was lax in not having pushed at that time for an immediate trial of this instant case. Mr. Lanna is good, but *nobody* is good enough to try case after case after case without some pause or respite. Accordingly, the assistant district attorney to whom this case was assigned for trial, Thomas A. Facelle, Jr., went ahead with the case of *People* v. *Tivis Troit Hawkins*, itself a case of relatively high priority involving a defendant who had been in jail since July 17, 1967, on a charge of first degree murder growing out of the slashing of the throat of yet another girl whom he had kidnapped in northern Westchester County. The conviction that followed therefrom was affirmed, *People* v. *Hawkins*, 35 A. D. 2d 654. That trial did not end until April 30, 1968.

Therefore, on April 30th there remained only the months of May and June, 1968, within which to bring this case to trial. We will acknowledge a certain delinquency in May, if it be deemed a delinquency to try cases for four weeks which have already been scheduled and witnesses subpoenaed, and that brings us to June. Without obliging Mr. Lanna to agree with us, we seem to recall that not trying this case in June, 1968, was his idea, rather than ours, because of the uncertainty as to the duration of the trial and the possibility of a conflict between it and a military obligation he had during that period. Whether or not this is so, however, it does remain a matter of record that Mr. Lanna was on active military service and did attend a school between June 16, 1968, and June 29, 1968, which was sponsored by the United States Army Signal Corps at Fort Monmouth, New Jersey.

During July and August of that year no juries were subpoenaed in Westchester County, and in consequence it was not possible to schedule this case for trial until September 9th at the earliest.

When the motion to inspect the Grand Jury minutes was made that

> ". . . effectively stayed any trial until after determination of the motion, (and) the defendant must shoulder the responsibility for the delay between (the making of the motion and the decision thereupon)." *People* v. *White*, 33 A. D. 2d 217, 220 (parenthetical matter supplied.)

That it was only a month is not significant; what is significant is that the respondents were actively interfering with the forward progress of the case at whatever expense in terms of delay. We must in that connection take respectful exception to the Court's remark:

> "If there is a claim that the defendant waived his right to a speedy trial, it must be supported by evidence more substantial than that . . . he made motions on matters unrelated to the question of waiver." *People* v. *Racassi*, 32 A. D. 2d 928, 928-929, 302 N.Y.S. 2d 301, 303.

It is submitted that there *are* no motions altogether unrelated to waiver. The very act of submitting a motion to a court bespeaks a certain waiver of the right to be speedily tried, because the motion itself, requiring, as it does, the application and frequently the protracted application of the court's attention to a legal question which must be resolved on a priority basis, in fact sidetracks the question of trial. We mean that expression "sidetracks" in its original railroad parlance where it is used as describing the way a freight train is pulled off the main line and made to wait on a sidetrack until the more important train

can flash glamorously by it and then returned to the main line where it resumes its plodding, tedious, routine little journey. In effect, this is what the Court was saying in that portion of *People* v. *White, supra,* which we quoted, *supra:* the defendant in having placed the motion before the court in the first instance must be held accountable for any delay that motion causes. It is submitted that *People* v. *White, supra,* stands for even more than that. There the subject with which the Court was directly concerned was delay beyond a statutory period, and the Court said:

> "A prisoner not brought to trial within the statutory period may not continue to participate in the proceedings and then, at his pleasure, demand and be granted a dismissal of the indictment. We can see no useful social or correctional purpose which would be served by a contrary holding." *People* v. *White, supra,* page 221.

If this rationale be transferred by analogy to non-statutory delay, it is submitted that the bringing of a motion, any motion, before the trial court should be deemed a waiver of any right which the defendant had prior to that time as regards delay, because by bringing the motion he is not only adding to the delay, he is endorsing all of the prior delay by his participation in the over-all delay.

Then there is the matter of the repeated adjournments between June, 1967, and February, 1968. There can be no doubt that the cases appeared on the calendar on those days because we rely in making the statement that they did on the records of the County Clerk, the keeper of the Court's official records. The respondents argued in the Court of Appeals in anticipation of our pointing them out to the Court that they were delays of but a few days. That isn't altogether accurate; it was adjourned on June 28, 1967, to September, 1967 (County Court Minutes, V. 62, p. 496). Somehow it got adjourned again until January 2, 1968, and on that date it was again adjourned (C.C.M.,

V. 63, p. 374), and the appellants thus ratified a delay of four full months. It was adjourned again on February 6, 1968, for the eminently proper reason that counsel for the appellants was engaged in the trial of one murder case and was shortly to begin another.

The appellants' glib reply to this was that their attorney keeps two diaries, and he doesn't show that he appeared at any of these adjournments. Whether he did or not is not at all germane; the question we would pose if he did not appear is why didn't he? It is an attorney's responsibility to follow his cases, and if he does not appear he not only permits an adjournment, he compels one, and it is hardly reasonable to allow him to complain about the prosecutor's default in the face of his own substantial contribution to that default. The New York Law Journal, the officially designated newspaper of the Second Judicial Department for the publication of daily court calendars, shows each of these calendar dates (cf., issues dated 1-2-68, p. 17, col. 8; 1-4-68, p. 16, col. 4; 1-10-68, p. 16, col. 4; 2-5-68, p. 17, col. 7). If counsel appeared, it seems clear that he consented to the adjournments and in so doing waived his right to a speedy trial, *People* v. *Prosser,* 309 N. Y. 353. If he did not appear, then nothing more really needs to be said, does it?

So far as we can ascertain, the case did not appear on any calendar until it was transferred to the then newly created Criminal Term of the Supreme Court, Westchester County, on January 31, 1969, about four and one-half months later (County Court Minutes, Vol. 66, p. 278), and it appeared on the calendar of the Supreme Court, Honorable P. Raymond Sirignano, J., was marked ready (cf., N.Y.L.J., 2-3-69, p. 21, col. 1). So far as the record indicates, no trial date was fixed at that time and, while the case was not reached for trial on that date, there seems to have been a general understanding that it would be shortly, so no adjournment, as such, occurred. Two months, almost to the day, later the motion to dismiss the in-

dictment was served, but only after the filing on March 3, 1969, of a bill of particulars in reference to the appellant Minicone pursuant to the People's demand (Code of Criminal Procedure, § 295-1). In other words, the motion to dismiss was served a scant thirty-two days after it was demonstrable that the appellants were still, to use the Court's expression, "participating in the proceedings," *People* v. *White, supra,* p. 221.

It is submitted that in deciding that the respondents were deprived of their right to a speedy trial the Court of Appeals has come to a conclusion materially at variance with those of the two cases from this Court upon which the Court of Appeals relied. *Klopfer* v. *North Carolina,* 386 U. S. 213, presents quite a different problem than the case at bar. *Klopfer* was a condemnation not of an overlong period of time during which the defendant had in fact been deprived of a speedy trial, but a condemnation of a procedure, the election by the prosecutor to *nolle prosequi* a case at his option, whereby a defendant could be suspended forever in the limbo of an undecided case which could be reanimated at any time and forever. This is best illustrated by pointing out that the *Klopfer* indictment was pending for only eighteen months and had in fact been tried once to a mistrial within that period. Plainly, what was being disapproved by the Court was not an unexplained delay which had already accumulated, but the *nolle prosequi* technique which fostered and promoted delays into long into the future.

Dickey v. *Florida,* 398 U. S. 30, when compared to this case is equally wide of the mark. The most marked difference is that the delay in *Dickey* was an incomprehensible eight years; ours was something under four. The second point of distinction is that for about six or seven of those years *Dickey* had been knocking down the State's doors, literally demanding a trial. There is no suggestion anywhere in the instant record that either of the respond-

ents ever even thought about going to trial. The final distinction was that in *Dickey,*

> ". . . there is present in this record abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records" (*Dickey* v. *Florida,* supra, at p. 38.

In the present case there isn't a hint of prejudice.

As late as Christmas of 1970 the Court of Appeals for the Second Circuit was reading *Dickey* as standing for the proposition that actual prejudice had to be shown. The Court held:

> "[6] Fitzpatrick also contends that he was denied his Sixth Amendment right to a speedy trial since thirty months elapsed from the date he was arrested until the date he was eventually tried. At the present time, however, we are governed by the standards of United States ex rel. Solomon v. Mancusi, 412 F.2d 88 (2d Cir.), cert. denied 396 U.S. 936, 90 S.Ct. 269, 24 L.Ed.2d 236 (1969). As we stated in that case, '[t]his circuit has looked to four factors in deciding whether there has been a violation of the right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the prejudice to the defendant; and (4) waiver by the defendant.' 412 F.2d at 90.
>
> [7-9] Here the delay was of thirty months, whereas 'dismissal has rarely been granted for a delay of less than several years.' United States ex rel. Solomon v. Mancusi, *supra,* at 90. With respect to the reason for the delay, the appropriate test is whether the delay was caused by purposeful or oppressive governmental action. United States v. Dooling, 406 F.2d 192, 196 (2d Cir.), cert. denied sub nom. Persico v. United States, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969). See also Pollard v. United States, 352

U.S. 354, 361-362, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957). Here there is no showing of such action; and besides there was a valid reason for delay since the case intake in the Eastern District of New York during this period was rapidly increasing without a full quota of judges being appointed or available. Third, Fitzpatrick has made no showing that the delay was prejudicial to him, unlike the situation in Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), where two witnesses had died and a third was unavailable to testify because of the delay, and where prejudice also occurred by the loss of police records. A mere allegation of the dimming of memory is not sufficient to establish the requisite prejudice. United States ex rel. Solomon v. Mancusi, *supra,* 412 F.2d at 90-91. See also United States ex rel. Von Cseh v. Fay, 313 F.2d 620, 624 (2d Cir. 1963). Finally, in any event, Fitzpatrick waived his right to a speedy trial by failing promptly to demand that right. United States v. Lustman, 258 F.2d 475 (2d Cir.), cert. denied 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed.2d 109 (1958). See also United States v. Maxwell, 383 F.2d 437, 441 (2d Cir. 1967); cert. denied sub nom. Aiken v. United States, 389 U.S. 1043, 88 S.Ct. 786, 19 L.Ed.2d 835 (1968); United States v. Roberts, 408 F.2d 360, 361 (2d Cir. 1969); United States v. Parrott, 425 F.2d 972 (2d Cir. 1970), cert. denied, 400 U.S. 824, S.Ct. 47, 27 L.Ed.2d 53 (1970)."

United States v. *Fitzpatrick,* 437 F. 2d 19, 26-27.

It is also submitted that the New York Court of Appeals misinterpreted the impact of various procedures which in the petitioner's judgment served as good cause for the delay herein. The Court said:

"Although the People show excuse for some of the delay attributable to pre-trial procedures in which de-

fendants must be deemed to have acquiesced, there are very long periods of delay which are substantially left unexplained in the record."

People v. *Minicone,* 28 N. Y. 2d 279, 280-281.

It then cites the period from February 16, 1967 to January 2, 1968. This entirely disregards the fact that on April 26, 1967, a motion to inspect the Grand Jury minutes was made on behalf of both respondents which was not decided until May 21, 1967, thus accounting for a three-month delay and reducing what the Court deemed "a very long delay" of thirteen months to ten months. Also ignored is the fact that the case appeared on the trial calendar on June 28, 1967, and without objection by the respondents was adjourned until September, 1967, thus shrinking the delay to four months, i.e., from September, 1967 to January, 1968. This holding betrays the Court of Appeals' own premise that:

"As for the asserted danger that a defendant may sit back and, if the prosecution fails for one reason or another to move the indictment for trial expeditiously, claim his right to a speedy trial and go free, it is somewhat less than real. Overlooked is the fact that the district attorney may at any time have the case placed on the calendar for a particular day. The defendant and his counsel will be in court and, if at that time the People seek a postponement and the defense fails to oppose or object, its failure will probably import consent to the ensuing delay and bar any later claim that defendant's right to a speedy trial had thereby been denied."

People v. *Prosser,* 309 N. Y. 353, 361.

The second "very long delay" referred to by the Court of Appeals is from January 10, 1968 until April 18, 1969. This overlooks the adjournment, again without opposition

by the respondents, from January 4, 1968 to February 6, 1968, when it appeared on the trial calendar. We have already alluded to the fact that the respondents' attorney, Vincent W. Lanna, Esq., was actually on trial on two murder cases continually from February 5, 1968 to March 12, 1968, and, just to give him a breathing spell, the District Attorney elected to try yet another murder case at that juncture in which Lanna was not involved. That lasted until April 30, 1968. The instant case next reappeared on the calendar and was marked ready for trial on January 1, 1969, but then, having heard the word alibi for the first time, the People moved for an alibi notice pursuant to the Code of Criminal Procedure, Sec. 295-1, which notice was served on March 3, 1969.

On the whole, it is submitted, there is no legal warrant for the conclusion that these respondents were denied their right to a speedy trial.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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July 8, 1971.

Appendix A.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOSEPH MINICONE and JOHN MASSIELLO, JR., Appellants.
Argued January 20, 1971; decided April 15, 1971.

Crimes—assault—right to prompt trial—delay of almost four years between indictment and trial effectively deprived defendants of their constitutional and statutory right to prompt trial.

A delay of almost four years between the indictment of defendants and their trial has effectively deprived them of their constitutional and statutory right to a prompt trial.

People v. *Minicone,* 35 A D 2d 780, reversed.

People v. *Massiello,* 35 A D 2d 780, reversed.

APPEAL, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 19, 1970, affirming judgments of the Westchester County Court (JOHN C. MARBACH, J.), rendered upon verdicts convicting defendants of the crimes of assault in the second degree and maiming.

Roy M. Cohn and *Irving Anolik* for appellants. I. Appellants were denied a speedy trial without good cause and their timely motion to dismiss after nearly four years' delay between indictment and the motion should have been granted not only based on the Sixth Amendment guarantee of a speedy trial, but on due process grounds as well. (*People* v. *Winfrey,* 20 N Y 2d 138; *Klopfer* v. *North Carolina,* 386 U. S. 213; *People* v. *Wilson,* 8 N Y 2d 391; *United States ex rel. Von Cseh* v. *Fay,* 313 F. 2d 620; *Ross* v. *United States,* 349 F. 2d 210; *People* v. *Masselli,* 13 N Y 2d 1; *People* v. *Darrah,* 29 A D 2d 816; *Johnston* v. *Zerbst,* 304 U. S. 458; *People* v. *Prosser,* 309 N. Y. 353; *People* v.

Racassi, 32 A D 2d 928.) II. Defendants were irretrievably prejudiced by certain pervasive and highly prejudicial publicity which was disseminated by the mass media during the trial. A motion for a mistrial should have been granted. III. The People failed to make out a prima facie case and failed to sustain the allegations of the indictment upon all the evidence in the record.

Carl A. Vergari, District Attorney (*James J. Duggan* of counsel), for respondent. I. Appellants were not denied their right to a speedy trial. (*People* v. *Winkler*, 34 A D 2d 834; *People* v. *White*, 33 A D 2d 789; *People* v. *Racassi*, 32 A D 2d 928; *People* v. *Prosser*, 309 N. Y. 353; *People* v. *Walston*, 60 Misc 2d 531; *People* v. *Darrah*, 29 A D 2d 816; *Chapman* v. *United States*, 376 F. 2d 705, 389 U. S. 881.) II. Appellants' motion for a mistrial was properly denied. III. Appellants' guilt was proved beyond a reasonable doubt.

Bergan, J. A delay of almost four years between the indictment of defendants on September 28, 1965 and their trial June 17, 1969, at which they were convicted of assault, second degree, and maiming, has effectively deprived them of their constitutional and statutory right to a prompt trial (Civil Rights Law, § 12; Code Crim. Pro., § 8, subd. 1; *People* v. *Prosser*, 309 N. Y. 353). Prosecutions in State courts are now governed by Sixth Amendment requirements for expedient trial (*Klopfer* v. *North Carolina*, 386 U. S. 213).

Although the People show excuse for some of the delay attributable to pretrial procedures in which defendants must be deemed to have acquiesced, there are very long periods of delay which are substantially left unexplained in the record. One of these periods is from February 16, 1967 to January 2, 1968. Another and even longer period is from January 10, 1968 until April 18, 1969, when the motion to dismiss was made.

The case is distinguishable, therefore, from *People* v. *Ganci* (27 N Y 2d 418) where there was a delay of 16 months which was attributable to the limitations on court facilities in spite of the consistent readiness of the People to try the case.

But even there two of the Judges of the court were of opinion that the lack of public trial facilities was not good enough a ground to excuse the 16-month delay (p. 430) and the period there considered seems to have approached the excusable limit of delay attributable to the absence of public trial facilities.

The obligation is on the prosecutor to move the trial promptly and no demand by the accused is required to actuate this obligation (*People* v. *Prosser*, 309 N. Y. 353, *supra; People* v. *Masselli*, 13 N Y 2d 1, 6; *People* v. *Darrah*, 29 A D 2d 816).

What is an unreasonable delay is a question of degree affected by the circumstances of the particular case. Long delays in the prosecution of criminal cases not only affect adversely the rights of the individual accused but have consequences which reflect on the efficiency and fairness of the criminal law.

Both the Federal courts (*Dickey* v. *Florida*, 398 U. S. 30; *Klopfer* v. *North Carolina*, 386 U. S. 213, *supra*) and the courts of New York (*People* v. *Winfrey*, 20 N Y 2d 138; *People* v. *Bryant*, 12 N Y 2d 719; *People* v. *Piscitello*, 7 N Y 2d 387; *People* v. *Racassi*, 32 A D 2d 928) have been tightening the requirement that criminal prosecutions move expeditiously.

The present case may usefully be compared with *People* v. *Bryant* (12 N Y 2d, at p. 720) where a two-year delay for which the People had "failed to establish good cause" was deemed "prima facie unreasonable".

The judgment should be reversed and the indictment dismissed.

SCILEPPI, J. (concurring). As one who is sensitive to the necessity for the prompt and effective prosecution of those charged with crime, I reluctantly agree to reverse.

Although unreasonable delays in prosecution are looked upon with the greatest disfavor, the absence of a showing of good cause for the delay, without more, cannot be equated with fault.

JASEN, J. (concurring in result). By constraint and with the greatest reluctance—based on the very long period of delay—I agree to reverse.

The District Attorney has a well-determined responsibility for bringing to trial or other disposition all criminal cases. Indeed, it is his unquestioned duty to observe the constitutional mandate guaranteeing a defendant a speedy trial, and no less to protect the People's interest in the expeditious prosecution of the guilty.

At a time when those concerned with the administration of criminal justice are attempting to expedite all criminal proceedings, the insufficiently explained 45-month delay in bringing the defendants to trial is intolerable.

Chief Judge FULD and Judge GIBSON concur with Judge BERGAN; Judge SCILEPPI concurs in a memorandum, and Judge JASEN concurs in result in a separate memorandum in which Judge BREITEL concurs; Judge BURKE taking no part.

Judgment reversed, etc.